APPEAL NO. 92126
FILED MAY 7, 1992

This appeal arises under the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On February 27, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as hearing officer. Appellant (claimant below) had been directed by the Texas Workers' Compensation Commission (Commission) to be examined by a designated doctor because respondent disputed the 24% impairment rating from a back injury assigned to appellant by his treating physician. Appellant was examined by a doctor at the request of respondent who assigned a 5% impairment rating. The designated doctor also assigned a 5% rating. Appellant contended at the contested case hearing that the Commission should use his treating physician's rating because his examinations by the doctors selected by respondent and the Commission were cursory. Appellant attached to his appeal request a Report of Medical Evaluation (TWCC-69) which reflected a "DOV" (date of visit) of "2/28/92" and which assigned appellant a whole body impairment rating of 33%. In its response, respondent asks us to disregard the TWCC-69 submitted by appellant since it was prepared after the hearing below. Respondent also urges that the weight of the evidence supports the 5% impairment rating.

DECISION

Finding sufficient evidence to support the hearing officer's findings of fact and finding no error in her conclusions of law, we affirm her decision that the whole body impairment rating assigned by the designated doctor be used by the Commission.

The hearing officer properly adduced as Hearing Officer Exhibits a Benefit Review Conference (BRC) Report and a disputed issue form signed on January 27, 1992, by the Benefit Review Officer (BRO). The BRC Report indicated that appellant was injured on (date of injury), and that he was an employee of (employer). According to the disputed issue form, the disputed issue unresolved at the BRC was "[w]hether or not the Commission ordered doctor's disability percentage is fair and just." Claimant there contended his own doctor's rating should be used while the respondent contended that all parties should be bound by the designated doctor. At the contested case hearing, the parties agreed that the disputed issue was whether the designated doctor's impairment rating should be used to determine appellant's impairment rating.

Appellant, who represented himself at the hearing, introduced no documents and was the sole witness. He testified through a translator that he wanted the Commission to use the impairment rating of 24% determined by his treating physician, Dr. N, because the doctors selected by the respondent and the Commission gave him only a cursory examination and didn't look at his x-rays. According to appellant's translator, those doctors "didn't check him out real good." He did say, however, that he was, in fact, actually examined by the other two doctors who did have him bend his back in various directions. He said that after his injury in April l99l, he saw Dr. N who continued to see appellant every

two weeks for some time, then monthly. He was later seen by Dr. C because respondent sent him. He saw Dr. O after the first BRC at which the reports from Dr. N and Dr. C with their respective impairment ratings of 24% and 5% were adduced. He said he did not agree to be examined by Dr. O but was directed to do so by the Commission.

Respondent called no witnesses but presented the reports of Dr. N, Dr. C, and Dr. O which were admitted without objection. The report from Dr. N consisted of a Report of Medical Evaluation (TWCC-69) which stated that appellant reached "maximum medical improvement"[MMI] on "9/5/91" and which assigned appellant a whole body impairment rating of 24% This report stated that appellant had had a spinal motion study performed at (clinic) on August 15, 1991, and that "[a] whole person impairment of 24% was assessed due to loss of lumbar & thoracic motion based on the A.M.A Guides to the Evaluation of the Permanent Impairment." Attached to Dr. N's TWCC-69 were documents dated August 15, 1991, signed by a licensed physical therapist at the clinic which stated the results of both thoracic and "trunk" range of motion (ROM) measurements of appellant with an "automatic inclinometer." According to these documents, appellant had a "total thoracic ROM impairment" of 6% and a "total lumbar ROM impairment of 18% for a total impairment of 24%.

The letter report of Dr. C, dated September 29, 1991, indicated that appellant's diagnoses included "lumbosacral strain (resolved)" and "lumbar strain (resolved)," that he had been off work for four months and 25 days, that no further treatment is indicated, that he may return to work as a construction worker, has reached MMI, and has an impairment of "5 percent of the whole person." This report recited the history of appellant's injury as involving his pushing a wheelbarrow loaded with grass and debris, hitting a curb with the wheel, and straining his back in reacting to keep the wheelbarrow from tipping over. Dr. C's report provided a quite detailed report of his examination of appellant's back in general and his spinal flexibility. Dr. C also examined x-rays taken on May 1, 1991, at Dr. N's office and commented that appellant had "dorsal spondylosis at three levels: T8-T9, T9-T10, T10-T11," together with osteophytes, narrowing of the disc spaces, and calcification within the disc spaces. Appellant also had a 15% narrowing of the L5-S1 disc space. According to Dr. C, these spinal conditions were "preexisting changes to his injury five months ago."

Dr. O's letter report of December 6, 1991, similarly provided a detailed history of appellant's injury, Dr. O's physical examination of appellant, and a review of appellant's medical records. Dr. O also viewed the May 1st x-rays and formed the impression of degenerative disc disease at L4-L5 and L5-S1. After his examination and review of all appellant's medical records, Dr. O's diagnostic impression was "[T]horacolumbar sprain without evidence of neurological involvement." Dr. O found that appellant had reached MMI and provided the following opinion on appellant's impairment: " Medical impairment of the patient is permanent medical impairment of his back up to 10%. He should be given 5% proportionment less due to the preexisting condition of spondyloarthrosis of the lumbar spine; finishing with a 5% permanent medical impairment, secondary to the job injury. The patient should be able to return to his former employment."

As previously noted, appellant attached to his appeal request a TWCC-69, apparently prepared the day after the hearing below, in which Dr. N assigned to appellant a 33% impairment rating. This report stated that appellant "has an additional 9% impairment due to the soft tissue injury to the thoracic and lumbar spine based on tabel (sic) 49." As we have noted in prior decisions, Article 8308-6.42(a)(1) limits our review to the record developed at the contested case hearing. *See* Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. HO-AO86992-01-CC-HO42) decided February 14, 1992; *and* Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. HO-91-136258-01-CC-BC41) decided April 27, 1992.

Article 8308-4.26(g) provides in pertinent part as follows:

"If the impairment rating is disputed, the commission shall direct the employee to be examined by a designated doctor selected by the mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor selected by the commission . . . . If the commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors."

Appellant did not agree to a designated doctor but rather was examined by Dr. O at the direction of the Commission. Thus, Dr. O's report assigning appellant a 5% impairment rating was entitled to presumptive weight and was to be used by the Commission unless the great weight of the other medical evidence is to the contrary. We agree with the determination of the hearing officer that the great weight of the other medical evidence was not to the contrary. Dr. C's report, contained in his extensive report and based upon his personal examination of appellant's spinal range of motion, similarly assigned an impairment rating of 5%. Dr. N's report assigning a 24% impairment rating appeared to adopt the spinal motion study performed by a licensed physical therapist at the clinic on August 15, 1991. The clinic report did contain the qualification that "[t]his evaluation is advisory and is (sic) no way limits a physician in determining level of disability."

Article 8308-6.34(e) makes the hearing officer, as the trier of fact, the sole judge of the weight and credibility of the evidence including medical evidence. We do not substitute our judgment for that of the hearing officer where, as here, there is some probative evidence to support the hearing officer's findings and conclusions. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). Her findings and conclusions were not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660

(1951); Pool V. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge